XIX. Workers' Compensation

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A. Jurisdiction

Indiana Code section 22-3-4-5,[1] which sets forth the jurisdiction of the Industrial Board, was construed in *Globe Valve Corp. v. Thomas*.[2] In *Globe Valve*, the claimant had been injured but had never received total disability benefits. Then, two years after the injury, the claimant filed a claim for compensation with the Industrial Board. The defendant filed a motion to dismiss alleging that because, prior to filing with the Industrial Board the claimant failed to demand workers' compensation or to attempt settlement of the claim, no dispute existed between the parties, as required by Indiana Code section 22-3-4-5. Nevertheless, the Industrial Board found a good faith dispute existed and awarded the claimant benefits.

Reversing the Industrial Board's decision, the Indiana Court of Appeals held that there was no evidence to support a finding that a good faith dispute had arisen as required by section 22-3-4-5.[3] The court remanded the case with instructions for the Industrial Board to dismiss, stating that the Industrial Board has no jurisdiction over cases in which a good faith dispute is lacking.[4]

The court in *Globe Valve* did not consider the parties' actions tantamount to a good faith dispute. According to *Globe Valve*, as a condition precedent to the Industrial Board's exercise of jurisdiction, the claimant must affirmatively make a demand upon the employer, must be denied compensation, and must be able to prove the employer's denial at the Industrial Board hearing. Thus, if a claimant enters a law office with one day left in the statute of limitations period, an attorney must make an immediate telephone call to the employer setting forth the claimant's demands and must obtain a denial before filing a Form 9 application.[5]

The *Globe Valve* decision seems to favor procedure over substance. The court could have found that the defendant's failure to pay any temporary total disability for two years and that the defendant's op-

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[1]Ind. Code § 22-3-4-5 (1982). This section provides, in part, that "[i]f the employer and the injured employee . . . *disagree* in regard to the compensation payable under this act . . . either party may then make an application, to the Industrial Board, for the *determination of the matters in dispute*." *Id.* (emphasis added).

[2]424 N.E.2d 155 (Ind. Ct. App. 1981).

[3]*Id.* at 157-58.

[4]*Id.* at 158.

[5]A Form 9 application is an application by the injured employee to the Industrial Board for an adjustment in the employee's claim for compensation.

position to the claimant's application for benefits constituted a sufficient showing of a good faith dispute.[6] However, the court's interpretation of section 22-3-4-5 recognizes jurisdictional requirements that are in harmony with the well-founded public policy that " 'the law abhors litigation, and favors the settlement of disputes by the parties interested . . . .' "[7]

B. Statute of Limitations

1. Occupational Diseases.—In *Bunker v. National Gypsum Co.*,[8] the court held that the three-year statute of limitations period provided under section 22-3-7-9(f),[9] relating to asbestos dust exposure, was unconstitutional.[10] The rationale for this holding was that, at the time the legislature enacted the section, the legislature was unaware of medical findings which indicated that more than thirty years could expire before a disease caused by exposure to asbestos dust became manifest.[11]

It is anticipated that the Indiana Supreme Court will accept transfer of this case and reverse the court of appeals, reinstating the three-year statute of limitations. The basis of the supreme court's reversal is expected to be on the grounds that the medical evidence which the court of appeals relied upon in its opinion was not within the Industrial Board's findings of fact.[12]

2. Industrial Accidents.—In *Coachmen Industries, Inc. v. Yoder*,[13] the claimant suffered injuries to his neck, eye, ear, nose and arm as a result of a truck accident on May 14, 1974. Shortly thereafter, the employer and employee entered into a Form 12 agreement[14] providing

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[6]*See* Patton v. Silvey Co., 395 So. 2d 722 (La. 1981).

[7]424 N.E.2d at 157 (quoting *In re* Moore, 79 Ind. App. 470, 475, 138 N.E. 783, 784 (1932)).

[8]426 N.E.2d 422 (Ind. Ct. App. 1981).

[9]IND. CODE § 22-3-7-9(f) (1982). This section provides that occupational diseases which are caused by the inhalation of asbestos dust must be filed within three years after the last day of the last exposure to asbestos. *Id.*

[10]426 N.E.2d at 425.

[11]*Id.* at 425-26.

[12]Indiana's Administrative Adjudication Act, IND. CODE §§ 4-22-1-1 to -30 (1982), requires that a court reviewing a decision of an administrative agency limit its review to the record before it. Specifically, the Act requires that "[o]n such judicial review such court shall not try or determine said cause de novo, but the facts shall be considered and determined exclusively upon the record filed with said court pursuant to this Act." *Id.* § 4-22-1-18. Going beyond the record of the administrative hearing has been held to constitute an infringement upon the discretion of the agency. *E.g.*, Indiana State Highway Comm'n v. Zehner, 174 Ind. App. 176, 185, 366 N.E.2d 697, 702 (1977).

[13]422 N.E.2d 384 (Ind. Ct. App. 1981). For discussion on other issues in this case, see *infra* notes 56-58 and accompanying text.

[14]A Form 12 agreement is an agreement between the injured employee and the employer as to the amount and duration of compensation.

for payment of temporary total disability. The employer paid these benefits for a total of sixty-two weeks, until July 22, 1975, and then refused to make any additional payments. After unsuccessfully attempting to negotiate further benefits, the claimant's attorney, relying upon Indiana Code section 22-3-3-27,[15] filed a Form 14 application on December 30, 1976, seeking a modification of the compensation award due to a change in condition.

In addition to other defenses, the defendant filed an affirmative defense based upon the untimeliness of the claimant's filing of the Form 14 application. This affirmative defense was based upon section 23-3-3-3,[16] which bars compensation claims filed more than two years after the accident.

Obviously, applying section 23-3-3-3 to the facts would dictate a finding for the defendant because that statute of limitation had run. However, the court of appeals relied upon an old line of cases and affirmed the Industrial Board's modification of the original award.[17] The court reasoned that the claimant's injuries, *at the time of the accident*, could not be medically determined to be a permanent impairment. Because the claimant's alleged permanent partial impairment must have *resulted* from the *injuries* and not *directly* from the accident, section 22-3-3-27 was the applicable statute governing the plaintiff's claim.[18] Thus, the court found that the claimant must be

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[15]IND. CODE § 22-3-3-27 (1982). This section provides, in part, that:

> The power and jurisdiction of the industrial board over each case shall be continuing and from time to time, it may, upon its own motion or upon the application of either party, *on account of a change in conditions, make such modification or change in the award*, ending, lessening, continuing or extending the payments previously awarded, either by agreement or upon hearing, as it may deem just . . . .
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> The Board *shall not make any such modification* upon its own motion, nor shall any application therefor be filed by either party *after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing*, except that applications for increased permanent partial impairment are barred unless filed within *one (1) year from the last day for which compensation was paid.*

Id. (emphasis added).

[16]IND. CODE § 22-3-3-3 (1982). This section provides, in part, that "[t]he right to compensation under this act shall be *forever barred unless within two (2) years after the occurrence of the accident*, or if death results therefrom within two (2) years after such death, *a claim for compensation thereunder shall be filed.*" *Id.* (emphasis added).

[17]422 N.E.2d at 389-91 (citing Tom's Chevrolet v. Curtis, 128 Ind. App. 201, 147 N.E.2d 571 (1958); Pettiford v. United Dep't Stores, 100 Ind. App. 471, 196 N.E. 342 (1935)).

[18]422 N.E.2d at 389-91. In a concurring opinion, Judge Sullivan pointed out a distinction between a resultant impairment and an impairment directly caused by the accident:

> The impairment is "resultant" . . . only if it does not exist in any degree at the time of the accident, or if existent, cannot be determined to be permanent. If the accident is the direct cause of an impairment it is not "resultant," even though the impairment which exists at the time of the accident

allowed benefits because the claimant complied with section 22-3-3-27; that is, the claimant was making a request for a modification within two years from the last day for which compensation was paid under the original award.[19]

The end result in *Coachmen Industries* was equitable in light of the fact that the employer had in its files a letter dated November 13, 1975, stating that the claimant's injuries had now reached a permanent, quiescent status and that the claimant had suffered fifty percent permanent partial impairment to his right ear.

C. Scope of Employer's Liability

1. The Traveling Salesman.—In *Olinger Construction Co. v. Mosbey*,[20] the court of appeals was again confronted with the age old problem regarding the limits of an employer's liability for an employee who suffers an accidental injury, after normal working hours, while away from home due to his employment. In this case, the employee, Mosbey, was a surveyor whose duties required him to be in Lawrenceburg, Indiana, 150 miles away from his home and principal place of employment. When in Lawrenceberg, Mosbey was on-call twenty-four hours a day, in the event that a problem occurred on the night shift and the night shift needed Mosbey's professional advice; however, such an event rarely occurred.

One evening after work, while sitting in his motel room in Lawrenceburg, Mosbey was visited by a stranger, Mr. Bell. Unknown to Mosbey, Bell had been recently fired by their mutual employer, Olinger Construction Company. Bell gained entrance to Mosbey's room under the pretense that Bell needed help in a carpentry course he was taking. Upon entering the room, Bell robbed Mosbey and thereafter stabbed Mosbey to death.[21]

The Industrial Board awarded full benefits under the Workers' Compensation Act to Mosbey's surviving spouse and dependent children. In affirming the Industrial Board's decision, the court of appeals looked to Indiana Code section 22-3-2-2 which allows benefits

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either increases in degree or lessens in degree, so long as the impairment which does exist is permanent in nature.

Id. at 394-95 (Sullivan, J., concurring).

[19]It should be noted that the defendant could have argued that section 22-3-3-27 did apply, but the claimant's application was barred because the claimant was seeking an increase in benefits and such applications are barred by section 22-3-3-27 unless filed within one year from the last day for which compensation was paid. IND. CODE § 22-3-3-27 (1982).

[20]427 N.E.2d 910 (Ind. Ct. App. 1981).

[21]The facts, as stated by the court, indicate that there was no evidence that Bell was attempting to visit retribution upon his former employer by killing Mosbey.

to an employee if the accident arose "out of and in the course of the employment."[22] In applying these criteria to the facts in *Mosbey*, the court found that a traveling employee is "in the course of" his employment from the time he begins his travels until he returns home or to his business, *unless* he embarks on a personal errand.[23] Clearly, Mosbey had not embarked on a personal errand at the time of his death. Furthermore, the court found that injuries arise "out of" the employment when there is a causal connection between the injuries and the employment.[24] The court stated that a causal connection exists when an accident arises out of a risk which reasonable men might comprehend as incidental to the employment *or* when there is a relationship between the working condition and the resulting injury.[25]

In finding that the accident in *Mosbey* arose "out of" the employment, the majority of the court adopted the positional risk theory which defines "out of" as any situation in which the employee is required to be at a certain place and the injury occurs when he is there.[26] However, in a well written dissent, Judge Sullivan disagreed with the majority's conclusion that the accident arose out of Mosbey's employment because he adhered to the traditional increased risk theory.[27] The increased risk theory defines "out of" as any situation in which the employee is exposed to a quantitatively greater risk than the general public either because the danger is greater *or* because the employee is exposed to the danger for a longer period of time than the general public.[28] Further, Judge Sullivan stated that even under the majority's theory Mosbey's injuries did not arise "out of" the employment because there was no causal connection between Mosbey's residence at the motel and the criminal act of a third party.[29]

It should be noted that even though the majority opinion upheld the Industrial Board's decision under the positional risk theory, this same case could have been upheld under the increased risk theory. Because Mosbey was identified as an employee who was away from home for an extended period of time, and who may be expected to have a significant amount of cash on him, the court could have found

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[22]IND. CODE § 22-3-2-2 (1982).

[23]427 N.E.2d at 913.

[24]*Id.* at 912.

[25]*Id.*

[26]*See* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 6.50, 11.40 (1978). Under this theory, the degree of danger is immaterial to the determination of whether the injury "arose out of" the employment. Simply stated, the positional risk theory is nothing more than a "but for" test.

[27]427 N.E.2d at 916 (Sullivan, J., dissenting).

[28]*See* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 6.30, 9.30 (1978).

[29]427 N.E.2d at 916 (Sullivan, J., dissenting).

that Mosbey was exposed to a quantitatively greater risk as required by the increased risk theory.

2. After Work and On The Premises.—Lona v. Sosa[30] addressed the question of whether the fatal shooting of a bartender-employee, at his place of employment after the bartender-employee was off duty, constitutes a compensable injury arising out of the employee's course of business. In this case, the normal duties of the bartender-employee consisted of opening the bar, cleaning up the bar from the previous night's activities, and working at the bar until about 5:00 p.m. In addition to these duties, the general manager would periodically request the employee to work additional nighttime bartending hours.

One evening, the employee remained at the bar after the general manager had returned to relieve him of his bartending duties, and the employee commenced drinking with a third party. After approximately two and one-half hours had elapsed, the general manager accused the employee of stealing because the cash register receipts were short five dollars. The general manager then pulled out a shotgun and killed the employee. The bartender-employee's widow filed an application for benefits with the Industrial Board, and the Industrial Board awarded death benefits to the widow.

The court of appeals reversed the Industrial Board's decision holding that, when it is before or after regular working hours, an employee is only deemed to be "in the course of" his employment if the employee is engaged on the premises in preparatory or incidental activities reasonably related to his work and if the period of time to perform such work is reasonable.[31] The court stated that there was no evidence to support the Industrial Board's finding that the decedent was in the course of his employment, either as a bartender or as a cleanup person, because the decedent had been relieved of all duties for approximately two and one-half hours when the shooting occurred.[32] The court further stated that, to arise out of the course of employment, the injury must take place within the time and space boundaries of the employment *and* within the course of an activity related to the employment.[33] The court noted that an activity is related to the employment if it carries out the purposes or advances the interest of the employer, either directly or indirectly.

Alternatively, the court could have upheld the decision of the Industrial Board by finding that the employee's presence at the tavern advanced a benefit to the employer, by allowing the general manager, who was balancing the books that evening, to have an on-the-spot conversation with the employee who was in charge of the cash

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[30]420 N.E.2d 890 (Ind. Ct. App. 1981).

[31]*Id.* at 894.

[32]*Id.*

[33]*Id.*

register, in the event that some question or mistake arose concerning the cash receipts.[34] Furthermore, the court could have held that, even though the employee was not on duty during the two and one-half hour period, the employee immediately came back within the course of his employment for the purposes of resolving the cash shortage. However, there is no indication that such contentions or arguments were made.

3. After Work and Off The Premises.—In *Wayne Adams Buick, Inc. v. Ference*,[35] a bookkeeper was requested, by her employer, to deposit the company mail in a mailbox across the street from her place of employment, on her way home. After depositing the mail, the bookkeeper was assaulted by two hoodlums on the street. As a result of this incident, the bookkeeper sought and was awarded workers' compensation benefits.

On appeal, the court acknowledged that whether an employee is acting within the course of employment is a question of fact; however, the court stated that such a finding is determined by whether the act is within a reasonable amount of time and space before the start and after the cessation of employment.[36] The court in *Ference* found that the act of mailing the company mail was within a reasonable time after the cessation of the bookkeeper's employment and, thus, held that the bookkeeper was within the course of her employment at the time of the assault.[37]

It should be noted that the facts of this case indicated that the bookkeeper normally remained inside the door of her employer's business until her husband arrived and then she would go directly to the waiting car in front of the employer's business. She followed this cautious procedure each day with the exception of when she periodically mailed the company's mail. Because the employee normally took this precautionary measure to assure that she would not encounter such an assault, it was reasonable to hold the employer responsible for those perils that the bookkeeper encountered as a result of the employer putting her in a hazardous situation. The employer's liability should continue until the employee has an opportunity to go directly from the mailbox to a place of safety.

D. Injuries Caused by Employment-Related Accidents

During the survey period, the courts again wrestled with the question of whether the claimant's activities at his place of employment

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[34]The reported facts do not indicate whether this was the employer's normal practice.

[35]421 N.E.2d 733 (Ind. Ct. App. 1981).

[36]*Id.* at 736 (quoting Payne v. Wall, 76 Ind. App. 634, 636-37, 132 N.E. 707, 708 (1921)).

[37]421 N.E.2d at 736.

caused the condition for which the claimant now seeks benefits. In *Lovely v. Cooper Industrial Products*,[38] the employee filed a Form 9 application[39] seeking compensation for the injury to his fourth and fifth lumbar disc interspace. The employee had worked for the defendant operating certain types of machinery which periodically required the claimant to do a significant amount of strenuous pulling and jerking. While on the job, the claimant felt a pain in his back; however, at the hearing before the Industrial Board, he was unable to point to any specific event that caused the pain in his back. Therefore, the Industrial Board denied benefits to the claimant.

Affirming the Industrial Board's decision, the court of appeals held that the medical evidence tendered at the hearing failed to show that the claimant's complaints were causally connected to his work at the employer's place of business.[40] Although the medical evidence indicated that the claimant's complaints about his back were consistent with the type of injury that could be caused by the job the claimant was performing, the doctor testified that the claimant had suffered boney arthritic problems in his back for six years, and the boney arthritic problems could also cause the same type of pain as that of which the claimant was complaining. In substance, the court held that there was sufficient evidence to support the Industrial Board's conclusion that the claimant did not meet his burden of proving that the work activities were more likely to cause the claimant's present condition than the other activities in his daily life.[41]

It should be noted that in discussing whether the claimant's injury was caused by a work-related accident, the court did clarify its understanding of the term "accident." The court stated that, for a claimant to show an accident caused the injury, the claimant must prove an unexpected incident or result occurred, and the claimant must prove a greater connection between work and the injury than the mere fact that the disability became manifest during the time the claimant was employed.[42]

In *Bowling v. Fountain County Highway Department*,[43] the court of appeals also affirmed the Industrial Board's denial of a claimant's Form 9 application on the grounds that even though the claimant could point to a specific time and place when his back became painful, this was insufficient, in itself, to support a claim for compensation.[44] In

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[38]429 N.E.2d 274 (Ind. Ct. App. 1981).

[39]For a description of a Form 9 application, see *supra* note 5.

[40]429 N.E.2d at 276.

[41]*Id.* at 279.

[42]*Id.* at 277 (construing Calhoun v. Hillenbrand Indus., Inc., 269 Ind. 507, 381 N.E.2d 1242 (1978)).

[43]428 N.E.2d 80 (Ind. Ct. App. 1981).

[44]*Id.* at 81.

Bowling, the claimant stated that he felt the pain in his back at the point in time when he stepped eighteen inches down from a low-boy trailer. However, the evidence indicated that the employee had a pre-existing, degenerative condition that had reduced itself to a point of being painful.

In both *Lovely* and *Bowling*, the courts were dealing with the problem of a claimant with a pre-existing condition that had degenerated and become painful while the claimant was on the job. In both cases, medical evidence could not establish any particular activities the claimant was performing at work as the cause of his present condition, any more than the activities of the claimant which were not employment-related. The result in *Lovely* may have been different had the medical evidence stated that, within a reasonable degree of medical certainty, the pulling and jerking that Lovely was required to do at his place of employment caused his present condition. However, it seems unlikely that the Industrial Board or the courts would arrive at a different result in *Bowling* because a different result would simply mean that if an employee begins feeling pain while at work, then the employer is liable for the condition. Such result is not in accord with the interpretation the courts have given to the definition of an accident.[45]

E. Employee's Civil Actions Against Co-Employees, Third Parties, and Employer's Insurers

In expanding the right of an employee to file suit against medical providers who are employed by the company and negligently treat the injured employee, the court in *McDaniel v. Sage*[46] held that a nurse who was employed by the company was not immune from suit by her co-employee when the nurse carried out her duties as a professional by administering treatment to the injured employee.[47] The court's rationale was that the nurse was an independent contractor because the employer did not have specific control over the professional in the performance of her duties, and because the employer could not intervene in the nurse-patient relationship.[48] Thus, the normal rationale for immunity of suits between fellow employees did not exist.

In *McGammon v. Youngstown Sheet and Tube Co.*,[49] the court of appeals held that an employee who settles his suit against a third

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[45]*See supra* note 42 and accompanying text.

[46]419 N.E.2d 1322 (Ind. Ct. App. 1981).

[47]*Id.* at 1326. IND. CODE § 22-3-2-13 (1982) abrogates a lawsuit by one employee for an injury sustained in the course of employment.

[48]419 N.E.2d at 1325-26. *See also* Ross v. Schubert, 388 N.E.2d 623 (Ind. Ct. App. 1979).

[49]426 N.E.2d 1360 (Ind. Ct. App. 1981).

party before judgment for injuries sustained within the provision of the Workers' Compensation Act is forever barred from further compensation or expenses from his employer.[50] This holding forces the practitioner to take a very close look at any third party actions before pursuing them because he may cause the employee to lose more money by filing civil suits than the employee would have realized by pursuing his workers' compensation remedies exclusively.

The court of appeals also dealt with the exclusivity of remedy for workers injured on the job in *Baker v. American States Insurance Co.*[51] After being injured on the job, the plaintiff received treatment from a doctor furnished by the employer's workers' compensation insurance carrier. Thereafter, the employer's workers' compensation carrier told the claimant that the doctor had rated the claimant's impairment as 24.5% and, on that basis, tendered a settlement offer to the plaintiff. After settling his claim, the claimant discovered that the actual impairment rating was 62%. The claimant then prosecuted his claim before the Industrial Board.

After receiving the full award from the Industrial Board, the plaintiff then filed a civil suit against the employer's workers' compensation carrier alleging that he was entitled to compensatory damages for attorney fees incurred in filing his Form 9 application because the insurance company had not acted in good faith and had acted fraudulently by misrepresenting the impairment rating in settling his claim. The trial court interpreted Indiana Code section 22-3-2-6[52] as establishing that the Indiana Workers' Compensation Act provided the exclusive remedy for the plaintiff's injuries and, thus, dismissed the case for failure to state a cause of action for which relief could be granted. The court of appeals, however, reversed the trial court's dismissal of the complaint. The appellate court circumvented the exclusivity of remedy theory by finding that section 22-3-2-6 only pertains to remedies of an employee " 'For personal injury or death by accident arising out of and in the course of the employment,' "[53] and the claim in *Baker* was one for fraud against the insurance company for the company's acts of bad faith.[54]

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[50]*Id.* at 1363.

[51]428 N.E.2d 1342 (Ind. Ct. App. 1981).

[52]IND. CODE § 22-3-2-6 (1982). This provision sets out the exclusivity of a worker's remedies as follows:

> The rights and remedies granted to an employee subject to [this act] on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death.

Id.

[53]428 N.E.2d at 1346 (quoting IND. CODE § 22-3-2-2 (1982)).

[54]428 N.E.2d at 1346-47.

It should be noted, however, that the appellate court affirmed the dismissal of the plaintiff's claim in regard to attorney fees as an element of damages. The court recognized that the employee could be awarded attorney fees when the employer's workers' compensation carrier acts in bad faith, but Indiana Code section 22-3-4-12 was the exclusive remedy for such a claim.[55] Thus, because the plaintiff did not file a claim against the employer or the employer's workers' compensation carrier asking for attorney fees over and above the award, the appellate court did not allow the plaintiff to ask for attorney fees in the civil suit.

It could be argued that the Workers' Compensation Act was intended to cover the type of claim asserted in *Baker*. The Indiana Legislature intended the Workers' Compensation Act to be a comprehensive approach to workers' rights and remedies. Therefore, in order to not interfere with the intent of the legislature, the exclusivity of a worker's remedy should remain within the Workers' Compensation Act until such time as the legislature sees fit to grant exclusions.

F. Employer's Bad Faith

In *Coachmen Industries, Inc., v. Yoder*,[56] the court of appeals found there was insufficient evidence to support the Industrial Board's award of additional attorney fees to the claimant's attorney due to the employer's bad faith and dilatory conduct in settling the claim. The Industrial Board had determined that the failure of the employer to tender a settlement offer pursuant to the fifty percent permanent partial impairment rating as set forth by the employer's own physician constituted bad faith. In reversing the Industrial Board, the court found that the employer could not be acting in bad faith because under a settlement agreement for the claimant's total disability, the employer had already paid the claimant all he would be entitled to for a fifty percent permanent partial impairment.[57] Thus, the court concluded that the evidence before the Industrial Board indicated, at most, that the parties had merely disagreed after a good faith effort to settle the claim.[58]

G. Discovery Matters

In *Josam Manufacturing Co. v. Ross*,[59] the court of appeals, for

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[55]*Id.* The court stated that the employee may be awarded attorney fees where the employer or insurer acts in bad faith, but only under IND. CODE § 22-3-4-12 in a claim with the Industrial Board. *See* IND. CODE § 22-3-4-12 (1982).

[56]422 N.E.2d 384 (Ind. Ct. App. 1981). *See supra* notes 13-19 and accompanying text.

[57]422 N.E.2d at 387, 393-94.

[58]*Id.* at 394.

[59]428 N.E.2d 74 (Ind. Ct. App. 1981).

the first time, specifically held that the Workers' Compensation Act and the Industrial Board fall within the purview of the Administrative Adjudication Act, and, therefore, the trial rules pertaining to discovery[60] are applicable in Industrial Board cases.[61] Thus, all the discovery tools utilized in civil cases can now be utilized before the Industrial Board. Also, to facilitate discovery, the Industrial Board now has the same power to sanction recalcitrant parties.

H. Evidentiary Matters

1. Reasonable Medical Certainty.—The court of appeals, in *Noblesville Casting, Division of TRW, Inc. v. Prince*,[62] held that when a physician is testifying about his medical opinion, he must base that opinion on reasonable medical certainty in order to show that the claimant's injuries were caused by the accident.[63] The failure to couch a physician's opinion in these terms risks dismissal of the claim at the close of the evidence for failure to prove the case.[64]

2. Degree of Impairment.—Although it is necessary for a physician to testify concerning the cause and permanency of a claimant's injuries, the court in *Coachmen Industries, Inc. v. Yoder*,[65] held that the claimant, himself, may testify as to the impairment that he suffers and the degree of that impairment.[66] Thus, the claimant may say that he is twenty percent impaired. However, he may not say that he is permanently impaired. The distinction is that the employee understands the limitations that the injury places on his bodily functions, but it is a medical determination as to how long his bodily functions will remain impaired.

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[60]IND. R. TR. P. 26-37.

[61]428 N.E.2d at 76-77.

[62]424 N.E.2d 1055 (Ind. Ct. App. 1981), *rev'd, vacated*, 438 N.E.2d 722 (1982 Ind.)

[63]*Id.* at 1058. After survey period, Indiana Supreme Court changed standard to "possible". *See* Noblesville Casting, Division of TRW, Inc. v. Prince, 438 N.E.2d 722 (1982 Ind.).

[64]424 N.E.2d at 1058.

[65]422 N.E.2d 384 (Ind. Ct. App. 1981).

[66]*Id.* at 392.